across a larger customer base, which should in turn foster incentives for investment by the merged entity, as well as other businesses that seek to sell equipment, technology, and services to the merged entity."[132] The Sprint Nextel merger will lead to similar public interest benefits that would have not been possible with two independent entities.

### 5. The Parties' BRS Activities Constitute A Cognizable Public Interest Benefit Notwithstanding The Indeterminate Nature Of BRS-produced Services.

At this time, services in the 2.5 GHz band are not sufficiently developed to subject them to antitrust review. The Commission should therefore accord similar treatment to BRS as it has given to other nascent technologies in the merger context. For example, in the *Cingular Order*, the FCC concluded that the market for stand-alone mobile data services was "not sufficiently developed at this time to [be] subject to a credible antitrust review."[133] The Commission also noted that "Multipoint Distribution Service… spectrum does not currently meet [its criteria for spectrum suitable for provision of mobile telephony services] because it is committed to non-mobile telephony uses currently and for the near-term future."[134] Similarly, in its analysis of the AT&T/MediaOne merger, the Commission concluded that the "nascent condition of the broadband industry" made it "premature to conclude that the proposed merger pose[d] a

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[132] *AT&T-Comcast Order* ¶ 184; *see also Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 1962 ¶ 32 (2003) (In allowing Mobile Satellite Service ("MSS") providers to utilize ancillary terrestrial components, the FCC explained that "larger customer bases could provide the opportunity to support larger production volumes and, therefore, lower costs for handsets and other equipment.").

[133] *Cingular Order* ¶ 78.

[134] *Id.* n.283.

sufficient threat to competition and diversity in the provision of broadband Internet services, content, applications, or architecture to justify denial of the merger or the imposition of conditions."[135] BRS presents an *a fortiori* case for "hands off" treatment: revised rules just became effective (and are subject to pending petitions for reconsideration), transition of the spectrum is just beginning, and proposed technologies are still in standards development.

Notwithstanding that the public interest benefits may not be realized for some time, the Commission previously has considered such benefits in its merger analysis. The Commission granted AT&T Wireless' and Cingular's application despite finding that many public interest benefits would be "challenging to achieve because of sizable technological and financial requirements and may therefore be realized only over the course of a number of years." [136]

### E. The Proposed Merger Will Position Sprint Nextel As A Key Partner For Content Providers, Systems Integrators, And MVNOs.

Any comprehensive competition and public interest analysis of this merger must recognize the importance of Sprint, and post-merger Sprint Nextel, as a potential source of wireless and wireline inputs for other service providers. Such entities include content providers, systems integrators, MVNOs, and other telecommunications firms seeking to offer full portfolios of consumer services, including voice, data, video, wireline, and wireless, as well as customized enterprise applications and integrated solutions for businesses. According to the *Ninth CMRS Report*, the resale sector accounts for approximately six percent of all mobile telephony

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135 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, Memorandum Opinion and Order*, 15 FCC Rcd 9816 ¶ 123 (2000).

136 *Cingular Order* ¶ 203.

subscribers.[137] In the *Cingular Order*, the Commission recognized the impact of resellers in the wireless marketplace, and it accounted for MVNOs and other resellers in its competitive analysis.[138]

As the Commission is aware, Sprint has been a leader in providing other firms with "second brand" opportunities. Under such arrangements, firms use Sprint's wireless and wireline networks to provide service to consumers under their own brand names (*i.e.*, "second brands"). In addition to the discussion of MVNOs that follows, Sprint has also utilized its wireline network and expertise to facilitate the entry of a number of large cable companies into the provision of wireline VoIP services.

In 2001, Virgin Mobile began offering service using Sprint's wireless network in the U.S. Virgin Mobile markets its service as a pre-paid option for youths. "The young teen to 20-something crowd gravitates to Virgin Mobile's no-nonsense approach to pricing and bills, says Howard Handler, chief marketing director."[139] Virgin Mobile offers one pricing plan, with all fees and taxes rolled into the price.[140]

In addition, Qwest offers its own wireless services to consumers using Sprint's wireless network. ESPN also will soon market its own brand of wireless services that will include applications to attract their loyal viewers—sports enthusiasts. "[T]he company said it would

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137 *See Ninth CMRS Report* ¶ 38.

138 *See Cingular Order* ¶ 92 ("We acknowledge, however, that non-facilities based service options have an impact in the marketplace and in some instances may provide additional constraints against anti-competitive behavior.").

139 *Id.*

140 Martha McKay, *Rivals Could Join Virgin Mobile in Renting Space on Sprint's Wireless Network*, The Record (New Jersey), Mar. 10, 2004.

offer postpaid voice services as well as sports news, information, commentary, analysis, statistics, ringtones, graphics, photos and logos, and streaming audio and video…."[141] Moreover, some cable operators, such as Sunflower Broadband, also are offering wireless services using Sprint's network, and on January 27, 2005, Time Warner Cable announced that it would begin a test-market sale of Sprint's wireless services in March 2005.[142] In June 2004, Sprint was recognized for being "among the leading suppliers of wholesale products and provisioning in an annual comparison study conducted by ATLANTIC-ACM, a Boston-based research and consulting firm."[143]

As of fourth quarter 2004, Sprint's MVNOs had 3.7 million customers. Second brand opportunities such as those with MVNOs "[open] up a whole new arena for customer growth."[144] According to the Precursor Group, MVNOs allow companies to:

> get into the wireless game without the time delay and expense of first replicating a wireless network… [they] can become national players on day one. Because MVNOs do not own the spectrum or deploy and maintain the network infrastructure, capex and operating costs are minimal. Instead, MVNOs can concentrate on leveraging brand loyalty and cross selling other services or

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141 Dan Meyer, *ESPN "Could Go All the Way" with Wireless MVNO Offering,* RCR Wireless News, Dec. 6, 2004, at 3.

142 Press Release, Sprint Corporation, Sprint, Sunflower Broadband Sign Agreement Enabling Sunflower Broadband to Offer Sprint PCS Services to Subscribers (March 19, 2004); David Hayes, *Time Warner Is Set to Sell Sprint Service*, Kansas City Star, Jan. 28, 2005.

143 *Sprint Wholesale Products and Provisioning Among Leaders in Annual Industry Report Card*, Rednova News, June 8, 2004, *available at* www.rednova.com/news/display/?id=62858 (visited Feb. 4, 2005).

144 Dan Meyer, *ESPN "Could Go All the Way" with Wireless MVNO Offering,* RCR Wireless News, Dec. 6, 2004, at 3.

> products… or providing unique content… [and] need not have expertise in communications….[145]

The MVNO business model allows second brand firms to focus on sales, marketing, and customer service rather than on network operations. In turn, the underlying carrier can make more efficient use of its network and fixed operational costs. Indeed, analysts have noted that "Sprint's increasingly successful MVNO operations have helped bolster its wireless operations and redefine its image."[146] As such, "[p]ast arguments of whether MVNOs are valid and whether carriers just become dumb pipes seem to be disappearing."[147] Customers are seeking customization, and MVNOs readily provide such customization, "appealing to [consumers'] senses of style."[148] Indeed, Rutberg Research noted nearly universal support for MVNOs at the 2004 CTIA convention: "carriers and potential MVNO brands appeared, in our view, both confident and realistic on the opportunities for MVNOs."[149] And Gary Forsee, Chairman and Chief Executive Officer of Sprint, was recognized as one of the best managers of 2004 by *BusinessWeek* because, in addition to other recent successes, Sprint's successful MVNO agreements have added three million subscribers to Sprint's wireless network.[150]

As MVNOs take advantage of such technological upgrades in their own products and services, other underlying carriers will face additional competitive pressure to deploy their own

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145 Communications Daily, Wireless Section, June 1, 2004.

146 Dan Meyer, *ESPN "Could Go All the Way" with Wireless MVNO Offering*, RCR Wireless News, Dec. 6, 2004, at 3.

147 Tracy Ford, *The Fred Flintstone Phone*, RCR Wireless News, Apr. 5, 2004.

148 *Id.*

149 *Id.*

150 *The Best & Worst Managers of 2004 The Best Managers*, BusinessWeek, Jan. 10, 2005.

high-speed data networks more quickly.[151] In commenting on Sprint's MVNO agreement with ESPN, Len Lauer, Sprint's President and Chief Operating Officer stated, "[w]e believe ESPN's involvement in wireless will help stimulate even further consumer demand for high-speed data services, capitalizing on the strength of Sprint's EV-DO strategy."[152]

Thus, the merger will advance the availability of wireless service from MVNOs by including advanced services and functionality, to the benefit of consumers and competition. Moreover, to the extent the sale of wireless service to MVNOs and other packagers and content providers is deemed by the FCC to be a distinct antitrust market, the combination of Sprint and Nextel will not impede competition in any such market. First, Nextel is not a supplier of wholesale services so the combination of Sprint and Nextel does not increase concentration among existing suppliers, and, at a minimum, T-Mobile remains as a viable potential entrant. Moreover, the presence of retail competition, which is robust (*see* Section III) constrains the prices that can be charged at wholesale.[153]

### F. The Proposed Transaction Will Benefit Public Safety Communications.

#### 1. Sprint And Nextel Both Have A Demonstrated Commitment To Providing High-Quality Services To The Public Safety Community.

Nextel and Sprint have each demonstrated a commitment to provide high-quality services to the public safety community. If the proposed combination is approved by the Commission, the merged company will move forward with an even stronger effort to develop wireless

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151 *See* Dan Meyer, *Data Rollouts Will Lead to More Competition for Carriers, MVNOs*, RCR Wireless News, July, 5, 2004, at 1.

152 Dan Meyer, *supra* note 146, at 3.

153 CRA Analysis ¶ 54.

products and services that public safety communicators can use to make all Americans more secure.

Nextel has a long and proud history of working closely with police, fire, emergency communications officials, and the rest of the public safety community. Nextel's iDEN network provides public safety entities with a reliable, interoperable communications system that complements dedicated public safety radio facilities, and with handsets that can withstand the challenging work environments faced by first responders and emergency personnel. In addition, Nextel has worked closely with public safety agencies to develop specific services and equipment that are tailored to the unique needs of the public safety community. Below are the key services and features that are available to Nextel's public safety customers:

- **Wireless Priority Service ("WPS")** – This nationwide service provides federal, state, and local public safety personnel and other authorized users with priority cellular service during emergencies. Such periods are typically marked by high call volumes and significant network congestion, and WPS dramatically improves cellular call completion rates for these users;

- **Priority Connect** – Analogous to WPS, Nextel's Priority Connect service enables public safety personnel to place Direct Connect calls ahead of other customers, increasing the likelihood that they will be connected during periods of network congestion;

- **Emergency Group Connect ("EGC")** – EGC enables public safety personnel to preempt other network traffic and enjoy instant and simultaneous contact among supervisors, squads, and mobile units, regardless of agency or jurisdiction;

- **Emergency Response Team ("ERT")** – Nextel's ERT provides wireless equipment, services, and support to public safety, emergency, and disaster recovery personnel during emergencies in urban and rural environments. Nextel ERT's specially-equipped trucks can be driven or airlifted to disaster recovery locations and special events to provide additional network capability, using satellite-based backhaul to Nextel's network; and

- **Interoperability Directory** – Nextel's Interoperability Directory is a secure, wireless, and online national directory of public officials that enables first responders and law enforcement officers to quickly locate and communicate with other public safety personnel.

Sprint has made similar efforts to serve the public safety community. For more than 20 years, Sprint has delivered reliable telecommunications solutions to civilian and military agencies. Sprint has provided government agencies with integrated telecommunications solutions, including basic wireless, wireline, and advanced services. Sprint has provided accurate and reliable communications services to facilitate emergency preparedness, disaster recovery, and Homeland Security solutions. With such applications as "Sprint Collaboration Solutions" and "Sprint Emergency Preparedness Services," public safety officials can manage emergency response and deployment, and first responders can in most circumstances confer and exchange information in real time. Through these services, specialized expertise and up-to-date information can be exchanged via voice, video, Web conferencing, and Internet-based, encrypted instant messaging.

The National Communications System ("NCS"), a federal government agency, has obtained funding for development and implementation of CDMA WPS, a portion of which will be utilized for Sprint to implement WPS. Sprint has submitted a proposal to the NCS prime contractor, Computer Sciences Corporation ("CSC"), to address Sprint's portion of this effort. Presuming Sprint's proposal is accepted and funding made available, Sprint anticipates entering into a WPS subcontract with CSC mid-year, 2005. Implementation and deployment is anticipated to take approximately 18 months from signing of the subcontract.[154]

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[154] Sprint's implementation timelines are dependent on the switch vendors delivering their proposed WPS capabilities.

### 2. The Public Safety Community Will Benefit From The Greater Redundancy, Capacity, And Cost Efficiency Of Sprint Nextel's Networks.

The public safety community will benefit from numerous effects of the proposed combination of Sprint and Nextel, described in this Application and in the attached Declarations. Sprint Nextel will enjoy increased network reliability, capability, and redundancy, with a greater ability to maintain service to public safety customers in the event certain facilities are disabled or damaged in a crisis. In addition, with this more robust service footprint, public safety terminals operating over the combined company's network in an emergency may have longer battery lives, since these radios will likely be closer to a Sprint Nextel base station. Public safety agencies with limited budgets will also benefit from the greater economies of scale of the combined company.

Public safety users, like other customers, will also benefit from the greater range of products and services available to Sprint Nextel subscribers. In the short term, public safety users can utilize the network and functionalities that best suit their needs, and will eventually benefit from the development of multi-band handsets that can access both Sprint's CDMA network and Nextel's iDEN network. In the long term, the merged entity's expanded spectrum holdings will further the Commission's ongoing efforts "to promote... innovation in wireless broadband services in support of public safety."[155] With this greater bandwidth, including in the 2.5 GHz band, Sprint Nextel will be able to develop a variety of new wireless broadband applications and advanced communications capabilities for public safety users. These advanced

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155 *See, e.g., 4.9 GHz Band Transferred from Federal Government Use, Memorandum Opinion and Order and Third Report and Order*, 18 FCC Rcd 9152 ¶ 2 (2003).

services will help ensure that agencies involved in the protection of life and property possess the communications resources needed to successfully carry out their Homeland Security mission.[156]

### G. The Combined Companies Will Move Forward With 800 MHz Spectrum Reconfiguration.

On August 6, 2004, the Commission released its Report and Order in its proceeding on "Improving Public Safety Communications in the 800 MHz Band" ("*800 MHz R&O*").[157] In the *800 MHz R&O*, the Commission adopted long-term and short-term measures to address the unanticipated but worsening problem of interference to public safety communications in the 800 MHz band, interference that has resulted primarily from the growth of cellular operations in the 800 MHz band and in the nearby cellular A and B blocks. As the long-term approach to eliminating this interference, the Commission adopted a plan to reconfigure the 800 MHz band to separate public safety and other "high-site" licensees from Nextel's spectrally incompatible Enhanced Specialized Mobile Radio ("ESMR") and other CMRS systems in the 800 MHz band utilizing "low-site," "high-density" cellularized architecture.[158] As the Commission recognized, the spectral proximity of these incompatible technologies is the root cause of this unacceptable public safety interference.[159] In addition, the Commission adopted technical standards defining unacceptable interference in the 800 MHz band and procedures that parties must follow to

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156 In addition, the merger will not affect Sprint's and Nextel's compliance activities regarding E911 and CALEA obligations and may, in fact, further their respective efforts in those important areas.

157 *See generally 800 MHz R&O, supra* note 23.

158 *Id.* ¶¶ 2-3.

159 *Id.* ¶ 2.

mitigate this interference.[160] On December 22, 2004, the Commission adopted and released a "Supplemental Order and Order on Reconsideration" that clarified and modified the *800 MHz R&O* in order to promote a more efficient and equitable spectrum reconfiguration plan for the 800 MHz band.[161]

Pursuant to the *800 MHz R&O,* Nextel accepted the modification of its licenses on February 7, 2005.[162] Thus, Nextel is ultimately required to return to the Commission all of its 800 MHz band spectrum holdings below 817/862 MHz, as well as all of its existing authorizations in the 700 MHz Guard Band.[163] In the 800 MHz band, Nextel must relinquish an average of 4.5 megahertz of spectrum per market—frequencies that will be made available for public safety use. Nextel also will bear financial responsibility for the full cost of retuning all 800 MHz band public safety systems and other private wireless 800 MHz band incumbents to their new spectrum assignments with comparable facilities.[164]

In return for Nextel's billions of dollars worth of spectral and financial contributions to this band reconfiguration, the Commission will modify Nextel's CMRS licenses to authorize it to operate in ten megahertz of contiguous spectrum at 1910-1915/1990-1995 MHz.[165] In

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160 *Id.* ¶ 3.

161 *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels, Supplemental Order and Order on Reconsideration,* WT Docket No. 02-55, FCC 04-294 (rel. Dec. 22, 2004).

162 *800 MHz R&O* ¶ 342.

163 *See, e.g., id.* ¶¶ 11-12.

164 *See, e.g., id.* ¶ 11.

165 *Id.* ¶ 211.

conjunction with its assignment to this replacement spectrum, Nextel must reimburse UTAM Inc. for the cost of clearing the 1910-1915 MHz band and fund the clearing of broadcast auxiliary service ("BAS") incumbents from the 1990-2025 MHz band.[166] At the conclusion of 800 MHz band reconfiguration, Nextel must pay to the U.S. Treasury any difference between the value of the 1.9 GHz band spectrum rights (determined by the Commission to be $4.86 billion) and the value of its returned spectrum at 800 MHz plus its costs incurred in reconfiguring the 800 MHz band and clearing the 1.9 GHz band.[167]

Nextel has worked for years towards a comprehensive solution to 800 MHz public safety interference, and the *800 MHz R&O* incorporates essential elements of a proposal developed and submitted to the Commission by Nextel, the major public safety organizations, and various private wireless organizations.[168] If the proposed merger is approved, the combined company will maintain this strong commitment to address public safety interference in the 800 MHz band. As specified in the Merger Agreement for this transaction, the merged company will accept the obligations enumerated in these conditions.[169] Sprint Nextel will move forward expeditiously with the implementation of the Commission's 800 MHz band reconfiguration process.

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166 *Id.* ¶¶ 244, 252.

167 *Id.* ¶ 329.

168 *See, e.g.*, Reply Comments of the Industrial Telecommunications Association, Inc., *et al.* (the "Consensus Parties"), WT Docket No. 02-55 (Aug. 7, 2002) ("Consensus Plan").

169 Sprint Corporation, Form 8K-Exhibit 2, § 6.12 (Securities and Exchange Commission, Dec. 15, 2004), Attachment A.

# III. THE PROPOSED TRANSACTION WILL PROMOTE COMPETITION.

As demonstrated in Section II, the proposed transaction will promote competition in mobile telephony markets as it will allow Sprint and Nextel to build on their strengths and provide better services at lower costs to consumers and provision advanced services faster than they would be able to accomplish individually. It is equally true that the merger of Sprint and Nextel will not result in adverse competitive effects, either by increasing Sprint Nextel's unilateral incentive to raise prices or by increasing the likelihood of coordinated behavior among wireless carriers, as demonstrated in the CRA Analysis.

## A. The Mobile Telephony Industry Is And Will Remain Competitive.

Competition in the mobile telephony industry in the United States is vigorous and dynamic and will remain so after consummation of the proposed transaction. In its Ninth Report on the status of competition in mobile telephony markets released in September 2004, the FCC concluded that there is effective competition, noting that "competition is robust in terms of the current number of competitors per market, and also that spectrum availability and other key determinants of entry conditions are favorable to continued competitive entry at the local level."[170] The FCC further stated that mobile carriers continue to compete on price and use innovative pricing plans and service offerings to compete with one another and that consumers freely switch providers in response to carriers' price and service differences.[171] Likewise, in the *Cingular Order* the FCC stated:

> Average revenue per minute, a proxy for mobile telephony pricing, declined from 47 cents in 1994 to 10 cents in 2003. By all

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170 *Ninth CMRS Report* ¶ 2.

171 *Id.* ¶¶ 3-4.

> indications, lower prices have stimulated rapid growth in the demand for mobile telephony services. The number of mobile telephony subscribers has grown nearly fivefold from almost 34 million at the end of 1995 to approximately 160 million at the end of 2003, and annual service revenues have more than quadrupled from $19 billion to $87 billion in the same period. Mobile penetration reached and then surpassed 50 percent of the population in 2003, up from just 25 percent at the end of 1998, and is forecast to continue rising significantly over the next five years. On average, U.S. mobile telephony subscribers talk on their mobile phones in excess of 500 minutes per month, more than three times as much as mobile subscribers in Western Europe and Japan.[172]

Thus, it is evident that mobile telephony markets in the U.S. are robust.

Moreover, the transaction will not impede new carriers from entering local markets to compete. As noted in its *Ninth CMRS Report*, the FCC has implemented policies to promote a more flexible licensing approach to allow "market forces to determine the number of competitors in a given geographic area."[173] These policies include, for example, the FCC's secondary markets policy,[174] its partitioning and disaggregation policies, and its Auction No. 58 that is now underway and makes available 242 broadband PCS licenses that had been previously cancelled or terminated.[175] These licensing policies, among others, promote easier entry into mobile telephony markets and led the FCC to conclude in its *Ninth CMRS Report* that overall entry conditions are favorable for competitive entry.[176] The proposed transaction will not impede other carriers from entering mobile telephony markets.

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172 *Cingular Order* ¶ 67 (footnotes omitted).

173 *Ninth CMRS Report* ¶ 82.

174 *Id.* ¶¶ 84-85.

175 *See id.* ¶ 81.

176 *Id.* ¶ 3.

Furthermore, the transaction will not diminish the ability of other carriers to compete based on price or services offered. And there is no indication that consumers' ability to switch to other carriers in response to competitive forces will be reduced. The FCC found in its *Ninth CMRS Report* that mobile carriers report that consumer churn rates vary between 1.5 and 3.5 percent per month, and one 2003 study found that 26% of wireless subscribers said they had switched carriers at least once in a 12-month period.[177] Moreover, with the implementation of wireless local number portability, competitive pressures to retain existing customers have increased. The FCC has noted that carriers have launched aggressive customer retention efforts, including, for example, offering existing subscribers better deals (*i.e.*, upgrades) previously used only in efforts to win new customers.[178]

After the transaction, there will continue to be four nationwide mobile carriers, as well as a substantial number of MVNOs and regional and local providers from which consumers will be able to choose to take their wireless service. This transaction will not hinder consumers from continuing to select the mobile carrier that offers them the best price and service. Moreover, industry analysts and observers do not expect this transaction to result in higher prices to consumers. Forrester Research analyst Lisa Pierce stated, "Sprint has always been pretty aggressive on wireless service prices, both business and consumer... I don't expect it to reverse course."[179] In addition, a Forrester Research, Inc. report on the merger states that mobile prices

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177 *Ninth CMRS Report* ¶ 161.

178 *Id.* ¶¶ 165-166.

179 Ellen Simon, *Wireless Rivalry; A Union Between Sprint and Nextel Would Cement Company As the No. 3 Mobile-Phone Operator*, The Miami Herald, at F1 (Dec. 16, 2004).

for enterprises will "remain flat-to-down" and that "the impact on consumer pricing will be negligible."[180] Similarly, Michael Bowen an analyst at Friedman, Billings, Ramsey Group Inc. wrote, "[w]e believe a potential combination could actually heighten competition in the sector by making a Nextel-Sprint combination more competitive, from a scale standpoint, with Cingular and Verizon Wireless."[181]

### B. A Quantitative Competition Analysis Of The Proposed Transaction Demonstrates That There Is No Significant Risk Of Anticompetitive Effects.

#### 1. Relevant Product Market.

In the *Cingular Order*, the FCC used the hypothetical monopolist test to determine the relevant product markets for analyzing the transaction.[182] The hypothetical monopolist test identifies "the smallest group of competing products or services for which a hypothetical monopolist in a geographic area could profitably impose at least a 'small but significant and non-transitory price increase,' presuming no change in the terms of sale of other products."[183] Thus,

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180 Charles S. Golvin, et. al., Forrester Research, Inc., *Sprint and Nextel Tie The Knot: Inviting Customers to Cut the Cord*, at 4 (Dec. 17, 2004).

181 Ben White & Ellen McCarthy, *Nextel, Sprint Close to Merger; Cell-Phone Firms Have Tentative Deal*, Washington Post, at A01 (Dec. 11, 2004).

182 *Cingular Order* ¶ 73.

183 *Id.* ¶ 71, citing United States Dep't of Justice and Fed. Trade Comm'n 1992 Horizontal Merger Guidelines, 57 FR 41552 (1992); United States Dep't of Justice and Fed. Trade Comm'n Revision to the Horizontal Merger Guidelines (Apr. 8, 1997), §§ 1.11, 1.12, *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm; Gregory Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003).

the relevant product market includes "all products 'reasonably interchangeable by consumers for the same purposes.'"[184]

Employing the hypothetical monopolist test in the *Cingular Order*, the FCC found separate product markets for interconnected mobile voice[185] and mobile data services[186] and also for residential and enterprise subscribers; however, it did not distinguish mobile data subscribers from mobile voice subscribers or enterprise subscribers from residential subscribers in its analysis. Instead, the FCC analyzed all of the separate product markets under a combined product market of "mobile telephony services."[187] We follow the FCC's "mobile telephony services" definition of the relevant product market to analyze the proposed transaction.[188]

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184 *Id. citing United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *see also United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001) (in determining what is a reasonable substitute, the court excluded "middleware" software from the definition of the relevant product market because of its present non-interchangeability with Windows, despite its future long-term potential); and *In re Wireless Telephone Services Antitrust Litigation*, 2003 WL 21012603 at 9 (S.D.N.Y. 2003) (relevant product market "consists of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered.").

185 The FCC defines mobile voice as "all commercially available two-way mobile voice services, providing access to the public switched telephone network via mobile communications devices employing radiowave technology to transmit calls." *Cingular Order* at n.268, *citing Ninth CMRS Report* ¶ 32.

186 The FCC defines mobile data service as "the delivery of non-voice information to a mobile device." "Data services available today include, but are not limited to, short messaging service, email, and access to the internet." *Id.* at n.269, *citing Ninth CMRS Report* ¶ 33.

187 The FCC found that it is probable that most mobile data services are sold as additions to mobile voice services. Thus, a combined analysis is "very unlikely to understate potential competitive harm to the market for mobile data services." *Cingular Order* ¶ 77. Moreover, the FCC found that stand-alone mobile data products, such as PDAs, are nascent and "not sufficiently developed at this time to [be] subject to a credible antitrust review." *Id.* ¶ 78. Likewise, the FCC stated that due to the fact enterprise customers tend

### 2. Relevant Geographic Market.

In the *Cingular Order*, the FCC stated that the Supreme Court defines a relevant geographic market "as the area of effective competition to which purchasers can practicably turn for services."[189] Furthermore, it stated that economic literature commonly defines the relevant geographic market "as the region in which a hypothetical monopolist that is the only producer of the relevant product or service in the region could profitably impose at least a 'small but significant nontransitory' increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change."[190]

The FCC determined that the relevant geographic market for mobile telephony services is local. In doing so, it found that consumers purchase their mobile telephony service on a local basis (versus traveling across the country); that they prefer local phone numbers; and that wireless carriers market their services differently in local areas, such as by offering specials and discounts.[191] The FCC also declined to define the local geographic market as a single county. While recognizing that all local geographic markets are unique, it found that it would likely be

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to be high-volume users, competition among the carriers for these customers is "likely to be relatively intense." Thus, it did not believe that an analysis based on combined residential and enterprise customers was likely to "understate potential competitive harm to the market for enterprise services." *Id.* ¶ 79.

188 Nonetheless, the Parties respectfully decline to endorse the FCC's relevant product market definition in the *Cingular Order*.

189 *Cingular Order* ¶ 82 n.284, *citing Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963).

190 *Id.* ¶ 82, n.285, *citing* DOJ/FTC Merger Guidelines § 1.21.

191 *Id.* ¶ 87.

unprofitable for the hypothetical monopolist to increase prices in a particular county, as consumers could travel to a nearby county to obtain an identical service at a lower price.[192]

For this reason, the Parties use the local geographic area as the relevant geographic market to analyze the proposed transaction.[193]

### 3. Structural Concentration Analysis.

In the *Cingular Order*, the FCC analyzed the likelihood of unilateral anticompetitive harm to CMRS competition in local markets by first employing structural market concentration "screens" to determine which, if any, local markets require further analysis. Markets that exceeded the screen thresholds were not presumed to suffer competitive harm caused by the transaction; rather, these markets were examined more closely, and the vast majority of markets that were subjected to more extensive analysis were ultimately found to raise no significant concern of harm to competition as a result of the merger. Two of the screens used by the FCC were based upon Herfindahl-Hirschman Index ("HHI") calculations for each local market. HHIs are measurements of market concentration calculated by squaring the market share of each participant in the market and then summing the results of those calculations. The higher the HHI, the more concentrated the market. The first screen used by the FCC in the *Cingular Order* identified markets where the post-merger HHI equaled or exceeded 2800 and the increase in HHI as a result of the merger (the "delta") equaled or exceeded 100 points. The second screen identified local markets where the HHI delta equaled or exceeded 250.[194] The third screen

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192 *Id.* ¶ 90.

193 Nonetheless, the Parties respectfully decline to endorse the FCC's relevant geographic market definition in the *Cingular Order*.

194 *See Cingular Order* ¶ 106.

identified markets where the merging parties would hold at least 70 MHz of wireless spectrum after the merger.[195]

The CRA Analysis follows the FCC's analysis in the *Cingular Order*, modified as appropriate to reflect the circumstances of this transaction.[196] The parties to this transaction have analyzed data prepared by Telephia for 235 local markets (defined by Telephia) because they do not have access to the Numbering Resource Utilization/Forecast ("NRUF") data or the carrier billing data submitted in response to a staff data request for the AWE/Cingular proceeding. Of the 235 markets analyzed, 102 are based on consumer surveys conducted on a regular basis by Telephia for its TABS database; market shares for the remaining 133 "snapshot" markets are estimated by Telephia using surveys on an occasional basis.[197]

Note at the outset that the FCC's third structural screen, CMRS spectrum in excess of 70 MHz, or approximately one-third of all presently allocated CMRS spectrum, is not exceeded in any geographic area where Sprint and Nextel hold spectrum; indeed, Sprint Nextel will have

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195 *See id.* ¶¶ 106, 109 ("[A]lthough 70 MHz represents a little more than one-third of the total bandwidth available for mobile telephony today, we emphasize that a market may contain more than three viable competitors even where one entity controls this amount of spectrum, because many carriers are competing successfully with far lower amounts of bandwidth today… Nevertheless, in line with the conservative approach embodied in this initial screen, the function of which was simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of this transaction, we subjected to further review any market in which one entity controls more than one-third of this critical input.").

196 Note that the CRA Analysis is preliminary in nature and necessarily dependent on the incomplete data available to the Applicants at this time.

197 Telephia makes its data available on a commercial basis. The Applicants each purchased the Telephia data for the purpose of conducting this economic analysis. As the data are proprietary to Telephia, the proprietary or confidential data underlying the CRA analysis has been redacted from the public version of this filing and will be made available subject to the protective order for this proceeding once it is adopted.

more than 60 MHz in only one geographic area, Hawaii.[198] The fact that this structural screen is not exceeded in any market indicates not only that no market warrants further review on this basis, but, as further discussed below, also is a telling indication of the availability of additional capacity for competitive responses by rivals to any hypothetical effort by Sprint Nextel to raise its prices.

The CRA Analysis determined that 95 out of 235 Telephia markets would be identified by the structural screens used by the FCC in the *Cingular Order*.[199] However, the structural screens used in the *Cingular Order* likely overstate the number of markets that warrant further analysis in this case. This is so for three reasons: (1) Nextel is not an ILEC, and the Commission itself regards Sprint as an "independent" wireless carrier; (2) as noted above, Sprint and Nextel will generally have less CMRS spectrum than post-merger Cingular; and (3) the proposed merger presents more credible efficiency benefits than did the Cingular/AT&T Wireless merger.[200] As stated in the CRA Analysis, "[t]hese three factors predictably lower the

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198 *See* CRA Analysis, Table 2. *See also* Combined Spectrum Post-800 MHz Rebanding ("Attachment I"). While the CRA Analysis only examined spectrum holdings for Telephia markets, the statement above is accurate with respect to all geographic areas in the U.S., as shown in Attachment J. The spectrum calculations discussed in this paragraph and shown in Table 2 of the CRA Analysis assume that the proposed band reconfiguration has taken place and that Nextel retains 14 MHz in the 800 MHz band, which likely overstates Nextel's post-reconfiguration holdings across the U.S. The calculations also treat Nextel Partners' spectrum as if it were Nextel's. Thus, it is actually an overstatement of the spectrum position of the combined companies. Note that the spectrum amounts used in the CRA Analysis were provided by the Parties, not Telephia. The spectrum amounts provided by the Parties were "mapped" by CRA into a Telephia market. *See* CRA Analysis ¶ 65 n.36.

199 Table 2 to the CRA Analysis lists the markets where the post-merger HHI exceeds 2800 and the delta is at least 100. It also identifies the additional markets where the HHI delta is at least 250.

200 CRA Analysis ¶ 66.

competitive risks raised by the Sprint-Nextel merger as compared to the Cingular-AT&T Wireless transaction. This suggests that the Commission should evaluate the Sprint-Nextel merger with more permissive initial structural screens."[201]

The point that Sprint and Nextel are not major ILECs is consistent with the Applicants' showing in Section II(B) above that the proposed transaction will actually promote intermodal competition. As described in the CRA Analysis, a wireless carrier with substantial ILEC operations has less incentive to lower wireless prices in its ILEC service area to avoid cannibalizing its wireline revenues, and a concomitant incentive to raise wireline prices. A wireless carrier with substantial ILEC facilities also has the incentive and opportunity to delay, deny, and degrade inputs such as access and interconnection to rival wireless carriers.[202] Neither Sprint nor Nextel has significant ILEC assets;[203] Nextel in fact has none, and the combined company plans to spin off Sprint's existing ILEC operations. Moreover, as noted above, the FCC today regards Sprint as an independent mobile telephony provider. In short, the FCC's concern in the *Cingular Order* that the Cingular/AT&T Wireless merger would remove an independent wireless carrier (AT&T Wireless) from the market[204] by combining it with a

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201 *Id.* ¶ 67 (footnote omitted). Note also that the fact that the proposed transaction reduces the number of national carriers from 5 to 4, or the number of carriers in any local market where Sprint and Nextel presently provide service by one, does not justify analyzing the proposed transaction under more stringent HHI screens. *See id.* at n.37.

202 *See id.* ¶¶ 68-74.

203 The FCC determined very recently that Sprint is an independent wireless carrier. *Cingular Order* ¶ 237, n.556.

204 *See id.* ¶¶ 243-245.

predominantly wireline carrier (Cingular, owned by SBC and BellSouth) simply does not apply here.

As noted above, the combination of Sprint and Nextel yields no geographic area in which the combined firm will hold more than 70 MHz of CMRS spectrum, even if spectrum held by Nextel Partners is attributed to the combined company.[205] Excluding the spectrum held by Nextel Partners, the combined company will have no more than 60 MHz in any geographic area. Indeed, in many areas the combined company will have only 30-50 MHz. In most of the geographic areas of the U.S., Sprint Nextel will have 50-60 MHz.[206] The Cingular/AT&T Wireless merger resulted in a wireless provider with far larger spectrum holdings with more than 60 MHz in 41 of the top 106 Telephia geographic areas for which spectrum holdings data was available.[207] Thus, the Cingular/AT&T Wireless merger presented a greater risk that rivals would lack the necessary capacity to respond to a price increase by the merged firm.

Finally, the CRA Analysis states that "[i]n any merger, the overall consumer impact depends on the relative magnitudes and likelihoods of anticompetitive harms and procompetitive benefits" of a proposed transaction.[208] Thus, if the Sprint Nextel merger generally has more substantial benefits than the Cingular/AT&T Wireless merger, the Commission can safely reduce the number of markets it examines in greater detail by relaxing the structural screens. In the *Cingular Order*, the FCC did not give substantial weight to the cost-saving claims put forward

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205 *See* CRA Analysis, Table 2; and Attachment J.

206 As noted, these estimates take into account Nextel's acceptance of the terms of the Commission's *800 MHz R&O*.

207 CRA Analysis ¶ 75.

208 *Id.* ¶ 77.

by Cingular and AT&T.[209] As demonstrated in Section II(C) above, the FCC would be justified in doing so here.[210]

The CRA Analysis indicates that if the HHI screens were relaxed by only 10% based on this analysis (i.e., setting the screen to identify HHIs of 3080 or more with deltas equal to or exceeding 110, or a 275 HHI delta regardless of the overall HHI level), then the number of Telephia markets that the screens would indicate require further analysis is reduced to 79. However, whether one uses the screens set in the *Cingular Order* or the screens modified to fit the competitive *milieu* of this transaction, a closer examination of the markets identified in the screens reveals no significant risk of unilateral or coordinated effects.

#### 4. The Proposed Transaction Poses No Significant Risk Of Anticompetitive Unilateral Effects.

The *Cingular Order* concluded that wireless service is a differentiated product and followed the *Merger Guidelines* for analyzing unilateral effects for such product markets, which basically involves an inquiry as to whether the merged company has the incentive and ability to unilaterally raise its price after the merger. The CRA Analysis follows that basic framework.

As noted in the CRA Analysis, the most extreme risk of adverse unilateral effects arises when the merged firm becomes the leading firm in a particular market by a large margin. This is generally not the case for this transaction in the Telephia local markets; Sprint Nextel would have a market share exceeding 50% in only one market, whereas Cingular and AT&T Wireless

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209 *See Cingular Order* ¶ 232.

210 *See also* CRA Analysis ¶¶ 47-82.

had a combined subscriber share of more than 50% in 30 Telephia markets.[211] Consequently, the risk of anticompetitive unilateral effects from the proposed transaction is slight.

In any event, the incentive to unilaterally increase price is reduced if: (1) rivals have the ability to reposition and expand output in response to a price increase; (2) Sprint and Nextel are not each other's closest substitutes; and (3) efficiencies from the merger result in significant reductions in variable costs, which creates an incentive for the merged carrier to reduce prices. All three of these factors are present in this merger.

A key factor in the FCC's competition analysis in the *Cingular Order* was the ability of rivals to absorb in the near term ten percent of the merged firm's subscribers in the event of a post-merger price increase.[212] First, as noted in the CRA Analysis, because post-merger Cingular has a larger market share than will Sprint Nextel in many markets, in an *a priori* sense in most local markets it will be easier for rivals to absorb 10% of Sprint Nextel's market share than it would be to absorb 10% of the post-merger Cingular's market share.[213] This analysis is buttressed by the fact that Sprint Nextel's spectrum local holdings will be generally smaller than post-merger Cingular's.[214]

The CRA Analysis estimates the ability of competitors to absorb additional subscribers in each local Telephia market identified by one of the screens by calculating their "Subscriber

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211 *See* CRA Analysis ¶ 85, and Table 5.

212 *See Cingular Order* ¶ 136. *See also id.* ¶ 134 ("[W]here a firm is already present in a market, has comparable service coverage, and has excess capacity relative to its current subscriber base, it should be able to adjust rates, plan features, handsets, advertising, etc., in the short run.") (footnote omitted).

213 *See* CRA Analysis ¶¶ 112-115 and Table 11.

214 *See id.*